trial of any action. The Solicitor-General's submission therefore presupposes that the practice followed in England, and for many years in the Colony, is wrong.

Secondly, whether or not the department claimed privilege, it would be the duty of the Court to refuse to admit the affidavit in evidence even if willingly produced by the proper officer having the custody thereof. It would be the bounden duty of the Judge "to have interposed and prevented the admission of such evidence," see *per* Dallas, C.J. in *Home* v. *Bentinck*, 2 B. & B. p. 130 at p. 162, a passage which is quoted with approval by the Lord Chief Baron in *Dawkins* v. *Lord Rokeby*, L.R. 8 Q.B. p. 255, and by Wills, J. in *Hennessy* v. *Wright*, 21 Q.B.D. p. 509 at p. 521.

And thirdly, quite apart from section 123 of the Evidence Ordinance an executor, if sued and even if he had a copy of the affidavit in his possession, would not be allowed to give evidence thereof, as secondary evidence of an inadmissible document is itself inadmissible (see *per* Lord Chelmsford in *Stace* v. *Griffith*, L.R. 2 P.C. p. 420 at p. 425).

I do not wish to express any opinion beyond what has been indicated above, as to whether the Commissioner of Estate Duties could on other grounds refuse to produce the affidavit on subpoena in the course of an administration action. It is to be noted, however that while section 124 of the Evidence Ordinance makes the public officer the sole judge as to whether the disclosure of a confidential document would or would not be contrary to the public interest, it presumes, as a condition precedent, that the document was a communication made to him in official confidence. This is a matter for the Court to decide, see *The Collector of Jampur* v. *Jamma Prasad*, I.L.R. 44 All. p. 360 at p. 365, and for the reasons stated above I do not think that the affidavit for the Commissioner of Stamps is a document made in "official confidence" within the meaning of section 124 of the Evidence Ordinance.

I think, however, that the refusal to produce the affidavit to the appellant can be supported on the narrower ground which is in accordance with the practice of the Inland Revenue Office in England and which is now followed in the Straits Settlements. It is that the affidavit is a quasi-confidential document which it is not the practice of the Stamp Office to disclose to members of the public. The applicant claimed inspection as of right and there is no law or rule which gives him any such right. The applicant is in the position of an outsider who wishes to inspect a letter in another person's custody without the consent either of the owner of the letter or his correspondent.

There is one further aspect of the case which requires consideration. I am quite sensible of the force of the argument addressed to me by Mr. de Mello that a Government department should not put difficulties in the way of beneficiaries discovering from official records what the estate, in which they have a share, consists of, and that if the required information is withheld, a Government office may be protecting dishonest executors for the sole reason that it fears to make a breach in the wall of official reticence. Without commenting on this argument, I think it is a real grievance if beneficiaries cannot ascertain the extent or nature of the deceased's estate without first bringing an administration action, but I think that this grievance could be met if the law provided as in Scotland, that an inventory of the estate should be annexed to the probate or letters of administration, and I suggest that the proper authorities should consider whether such an amendment is not desirable.

As regards the present application, I think it fails both as regards the procedure adopted and on the merits, and should be refused with costs.

Application refused with costs.

Solicitor for the Applicant—*A. de Mello.*

[ORIGINAL CIVIL JURISDICTION.]

TERRELL, J.

September 12, 1935.

THE FRESH FOOD & REFRIGERATING COMPANY LTD. AND SYME & COMPANY AND BEHR & MATTHEW'S LTD. (Third Parties).

[SINGAPORE SUIT No. 1294 of 1935]

Ordinance No. 111 (Civil Law) Section 5 (1)—Law of Property Act 1925 Section 61.—Law Reform (Miscellaneous Provisions) Act 1934 Section 3.

In a mercantile contract entered into in the Colony 'month' *prima facie* means 'calendar month' unless the contract otherwise requires.

Section 3 of the (English) Law Reform (Miscellaneous Provisions) Act 1934 has no local application in the Colony because of the saving clause contained at the end of Section 5 (1) of Ordinance No. 111 (Civil Law) and therefore the Court has no discretion to award interest on unliquidated damages.

Trial of Action.

In this case the Plaintiffs sued the Defendants for damages for breach of a contract in writing contained in two letters whereby the Defendants agreed to engage certain space for cold storage for a cargo of shell and yolk eggs. The main defence was that the Defendants contracted as agents for the owners of the cargo (the third parties) and that the claim if any was against such principals. Alternatively if held liable to the Plaintiffs the Defendants claimed to be indemnified by the third parties. The action duly proceeded and went to trial.

Roland Braddell (*Koek* with him) for the Plaintiffs.

Vaux for the Defendants.

Spenser Wilkinson (*Thorne* with him) for the third parties.

The learned Judge held on the facts that the Defendants had contracted as principals and not on behalf of the third parties. The Defendants' claim for indemnity against the third parties

accordingly failed. The Defendants put forward two other defences namely:—(a) that the Plaintiffs accepted a larger amount of yolk eggs in lieu of and in substitution for the total amount of shell eggs and yolk eggs originally contracted for, and (b) that there was a novation in that McAlister & Company were substituted for the Defendants on the Contract.

With regard to these two defences the learned Trial Judge held with regard to (a) there was no evidence of this but evidence contra and with regard to (b) he held that in fact there had been no novation.

The case having been decided almost entirely on fact it is unnecessary to set out the whole of the arguments or of the written judgment. Two questions however were dealt with by the learned Trial Judge which were of novel application in the Colony.

TERRELL, J. (the learned Trial Judge) after dealing with the matters referred to above proceeded as follows in giving Judgment.

As regards the measure of damages, this raises the only real difficulty in the case. After considerable argument it was agreed that the proper measure of damages is the rent for one month for the space, 79,903 cubic feet, which the Defendants did not in fact occupy. The letter of the 8th August, which contains the terms which were accepted by the Defendants, states:

> 'Our charge for storage would be on the basis of twenty five (25) cents per cubic foot per week or part thereof'

and

> 'It is to be understood that storage would be for not less than one month.'

The Defendants contend that 'month' means lunar month and that the gross amount for which they are liable cannot exceed $79,903 subject to certain deductions. The Plaintiffs, on the other hand, claim that 'month' means 'calendar month' and that as August contains more than 28 days, payment should be for a minimum of 5 weeks.

It is to be noted that the Plaintiffs themselves when they sent in their bill on the 16th August, adopted neither construction and claimed $122,416.66 for one month's storage rent in respect of 113,000 cubic feet. It is difficult to see how this figure is arrived at, but it would appear that they charged for 31 days at the rate of 25 cents per cubic foot per week. This is what they may have intended, but it certainly is not what they have said.

I think that the construction of the contract is a question or issue 'with respect to mercantile law' within the meaning of section 5 (1) of Ordinance No. 111 (Civil Law). and accordingly the law to be administered is the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, and in view of section 61 of the Law of Property Act 1925 there can be no doubt that in the construction of contracts in England 'month' *prima facie* means 'calendar month' unless the contract otherwise requires.

It was argued by the Defendants that in this particular contract 'month' must mean a month of 4 weeks, otherwise the contract would mean that the Defendants had to pay in any event for 5 weeks' storage, and this is not what the contract says. But I do not see any inconsistency in the contract providing that the space should be occupied for not less than 31 days, while in another part of the contract provision should be made for payment at the rate of 25 cents per cubic foot for a week or part of a week. In effect of course the Defendants would have to pay the same whether they occupied the space for 31 days or for 35 days, and I cannot see that this circumstance compels me to reject the ordinary meaning which should now be attributed to the word 'month'. The Plaintiffs applied to amend the particulars of their claim for damages, but as all the relevant facts had been pleaded I did not think that any such amendment was necessary.

[APPELLATE CRIMINAL JURISDICTION.]
BURTON, Ag. C.J.; TERRELL & WILLIAMSON, JJ.
July 23, 1935.

REX v. TAN AH SENG.

[SINGAPORE CRIMINAL APPEAL No. 9 of 1935]

Criminal misappropriation—money entrusted for a criminal purpose—Penal Code, S. 406.

A prosecution will lie for criminal misappropriation of money entrusted to a person even if it has been entrusted to him for a criminal purpose.

Yong Ah Kim v. *Lee Kee Chiang*, 1905 S.S.L.R. 142 over-ruled.

Magistrate's Appeal.

The facts and arguments sufficiently appear from the Judgment.

Worley, Deputy Public Prosecutor for the Crown.

Respondent in person.

Cur. Ad. Vult.

BURTON, AG. C. J., TERRELL, J. AND WILLIAMSON, J.—Tan Ah Seng, the respondent, was charged before the Third Magistrate Singapore with Criminal Breach of Trust under section 406 of the Penal Code. The facts were never fully investigated but for the purposes of this appeal it must be assumed that the respondent received $40 for the purpose of renting a house to be used by some prostitutes and misappropriated it. The Magistrate acquitted the accused without calling upon him for his defence on the ground that the transaction was an illegal contract.

The justification for this order is no doubt to be found in the case of *In the Matter of Yong Ah Kim, complainant* v. *Lee Keng Chiang*, (1905) S.S.L.R. 142 in which Fisher, J. held that a prosecution will not lie for criminal misappropriation of money paid to a person for a criminal purpose.

In that case Yong Ah Kim gave Lee Keng Chiang $4 with which she commissioned him to bribe the Chinese Interpreter of a Police Court, but instead of attempting to bribe the Interpreter he converted the money to his own use.